

**2009 DRAFTING REQUEST**

**Bill**

Received: **02/03/2009**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Administration-Budget**

By/Representing: **Gauger**

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Courts - immunity liability**

Extra Copies:

Submit via email: **YES**

Requester's email:

Carbon copy (CC:) to:

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**Pre Topic:**

DOA:.....Gauger -

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**Topic:**

Contributory negligence

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**Instructions:**

See attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P1	rnelson2 02/03/2009	csicilia 02/03/2009	rschluet 02/03/2009	_____	lparisi 02/03/2009		

FE Sent For:

**<END>**

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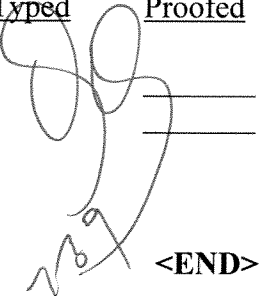
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/P1	rnelson2	/P1 cjs 2/3 09					

FE Sent For:

**<END>**

## 2009-11 Budget Bill Statutory Language Drafting Request

- Topic: Joint and Several Liability
- Tracking Code:
- SBO team: Health and Insurance
- SBO analyst: Sue Jablonsky
  - Phone: 7-9546
  - Email: sue.jablonsky@wisconsin.gov
- Agency acronym: OCI
- Agency number:
- Priority (Low, Medium, High): High

Intent: To allow jury instructions to let jurors know the legal conclusions which will follow from their verdict in determining negligence. See attached.

Post-it® Fax Note		7671	Date	# of pages
To	LRB		From	Sue I.
Co./Dept.			Co.	
Phone #			Phone #	
Fax #			Fax #	

## Explanation of Bill

### Joint and Several Liability

The law prior to 1995 was "... any one of two or more joint tortfeasors, or one of or two or more wrongdoers whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence." *Kingston v. Chicago & N.W. Ry. Co.*, 191 Wis. 610, 613, 211 N.W. 913 (1927).

In 1995, "the legislature's amendment of Wis. Stat. § 895.045, however, significantly changed joint and several liability. Assuming that the plaintiff is not negligent, that plaintiff can still recover all of his or her damages from one of two more joint tortfeasors so long as one is found to be 51% or more causally negligent. But a plaintiff can no longer recover all of his or her damages from that same tortfeasor if that tortfeasor is found to be less than 51% causally negligent. 1995 Wisconsin Act 17, in amending § 895.045, thus limited a plaintiff's recovery from that tortfeasor found 51% or less causally negligent to that portion of the total negligence that is attributed to that tortfeasor. Wis. Stat. § 895.045(1)." *Matthies v. The Positive Safety Mfg.*, 2001 WI 82, ¶14, 244 Wis. 2d 720, 628 N.W.2d 842.

The current draft returns to pre-1995 interpretation and recognizes the doctrine of joint and several liability by adding the language: Any person found to be causally negligent whose percentage of causal negligence is equal to or greater than the plaintiff's contributory negligence shall be jointly and severally liable for the damages awarded.

### Comparative Negligence

Under Wisconsin law, where there are multiple defendants, the percentage of negligence that is allocated to each of the defendants found causally negligent cannot be combined to establish that the defendants' negligence is equal to or greater than the plaintiff's. *Ford, Bacon & Davis*, 96 Wis. 2d at 326-27; *Mariuzza v. Kenower*, 68 Wis. 2d 321, 325, 228 N.W.2d 702 (1975). The Legislature addressed this issue by adding the following sentence to Wis. Stat. § 895.045(1): "The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent." 1995 Wis. Act 17, § 1. This means the even where multiple defendants have a combined negligence greater than a plaintiff, he or she cannot recover from any one defendant unless the plaintiff's negligence is "not greater than" each of the defendants' negligence. Wis. Stat. § 895.045(1). For example, if a plaintiff is found to be 40% negligent and one joint defendant 39% negligent, and the other 21%, the plaintiff cannot recover.

The current draft would change this and allow the comparison of the plaintiff to be compared to the combined negligence of the defendants. So in the above example, the plaintiff could recover since the combined negligence of the defendants, 39 plus 21 equals 60, which is more than the plaintiff's negligence of 40 percent.

## **Explanation of Contributory Negligence**

Wisconsin is actually in a very small minority of states that refuse to explain to juries the effects of their answers. The Wisconsin Judicial Council found that of the 33 states with comparative negligence systems similar to ours, only Texas and Wisconsin do not let juries know the effect of their verdicts in contributory negligence cases. Most states presently allow jurors to know the legal conclusions which will follow from their verdict. Section 2 would allow jury instructions to include an explanation of the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.

# Joint & Several Liability

## **What is joint and several liability?**

Under American law, all citizens have the power to hold wrongdoers accountable. A principle of our legal system called "joint and several liability" ensures when we are injured, those who are found responsible will compensate for our losses. This sound rule protects all citizens.

Joint and several liability has been around for a long time. It was first developed and is routinely used by businesses for commercial law — bills, notes, guarantees. In the area of personal injury law, the rule says if two or more people combine to cause an injury, both people are responsible for the full damages.

For a joint defendant to be found responsible, a jury must find a "causal" connection between the actions of that defendant and the injury. Some call it the "but for" rule. "But for" the actions of a defendant or the combined actions of joint defendants, the injury would not have occurred.

**Joint and several liability makes only those who are judged responsible pay for damages.**

Under the American rule all parties who are found liable, and none who are found not to have contributed to a loss, are responsible to pay the loss. Joint and several places the responsible of paying for the damages on those found liable. This reasonable rule puts the burden of allocating damages where it belongs — on the wrongdoers.

**Joint and several liability ensures that wrongdoers, not the innocent injured party, to bear the cost of a loss.**

In some cases, one wrongdoer may be insolvent, immune or unavailable. Because the doctrine requires the other wrongdoers to cover the cost of the loss, the innocent injured party does not have to bear the loss if a wrongdoer cannot pay. Only those who contributed to the loss must pay. This puts the burden of nonpayment on the other wrongdoers, not the one who has suffered the harm. Otherwise the innocent injured party will suffer twice, one when injured and second when a wrongdoer cannot pay.

Current Wisconsin law does place the burden of nonpayment on an innocent injured party if there are multiple wrongdoers and none of them are found over 51 percent at fault.

**Nelson, Robert P.**

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**From:** Gauger, Michelle C - DOA [Michelle.Gauger@Wisconsin.gov]  
**Sent:** Tuesday, February 03, 2009 8:22 AM  
**To:** Nelson, Robert P.  
**Subject:** Joint and Several drafting instructions  
**Importance:** High  
**Attachments:** Joint and Several.pdf; image001.gif; image002.gif; image003.gif

Robert,

I believe this is the page you are missing in your drafting instructions. Please let me know if you have any questions after reviewing this.

Michelle Gauger  
608-266-3420

02/03/2009

## **Joint and Several Bill**

**SECTION 1.** 895.045 (1) and amended to read:

895.045 (1) (title) **COMPARATIVE NEGLIGENCE.** Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the combined negligence of all the persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. Any person found to be causally negligent whose percentage of causal negligence is equal to or greater than the plaintiff's contributory negligence shall be jointly and severally liable for the damages awarded. ~~The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.~~

**SECTION 2.** 895.045 (2) of the statutes is deleted:

~~895.045 (2) **CONCERTED ACTION.** Notwithstanding sub. (1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.85 (5).~~

New SECTION 2:

In an action to which this section is applicable, the instructions to the jury given by the court shall include an explanation of the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.



gjs

DOA:.....Gauger – Contributory negligence

**FOR 2009-11 BUDGET – NOT READY FOR INTRODUCTION**

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Do Gen

1 AN ACT ...; relating to: the budget.

***Analysis by the Legislative Reference Bureau*****COURTS AND PROCEDURE****CIRCUIT COURTS**

Under current law, the court is required to instruct the jury on the law involved in the case before the jury. In addition, the court provides the jury with a complete set of written instructions that provide the burden of proof and the substantial law to be applied to the case. This bill adds a requirement in civil actions involving contributory negligence that the court explain to the jury the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.

Under current law, in a civil action involving negligence, the injured party may recover damages resulting from negligence of another person if the injured party's negligence is not greater than the negligence of the person against whom recovery is sought. Currently the negligence of the person seeking recovery is measured separately against the negligence of each person whose negligence caused the damages. If the causal negligence of the person against whom recovery is sought is less than 51% of the total negligence, that person's liability is limited to the percentage of negligence attributable to that person. Currently, if the person's causal negligence is 51% or more of the total negligence, that person is jointly and severally liable for the damages, which means that the person may be liable for all of the damages, reduced by the percentage of negligence attributable to the person seeking

percent  
Percent

recovery. Current law also provides that if two or more parties act in concert, those parties are jointly and severally liable for all of the damages resulting from that action, except punitive damages.

This bill removes the provision regarding persons acting in concert, the provision that the negligence of the person seeking recovery is compared to each person who was negligent separately, the provision that the liability of a person who is less than 51% negligent is limited to that person's percentage of the total negligence, and the provision that the liability of a person whose causal negligence is 51% or more is jointly and severally liable. Instead, the bill allows a person injured to recover damages if that person's negligence is not greater than the combined negligence of all of the person against whom recovery is sought. The bill also provides that any person whose causal negligence is equal to or greater than the causal negligence of the person seeking recovery is jointly and severally liable for the damages awarded to the person seeking recovery.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 805.13 (4) of the statutes is amended to read:

2           805.13 (4) INSTRUCTION. The court shall instruct the jury before or after closing  
3 arguments of counsel. Failure to object to a material variance or omission between  
4 the instructions given and the instructions proposed does not constitute a waiver of  
5 error. The court shall provide the jury with one complete set of written instructions  
6 providing the burden of proof and the substantive law to be applied to the case to be  
7 decided. In a civil action involving contributory negligence, the court shall explain  
8 to the jury the effect on awards and liabilities of the percentage of negligence found  
9 by the jury to be attributable to each party.

10           **SECTION 2.** 895.045 (1) of the statutes is renumbered 895.045 and amended to  
11 read:

12           895.045 (B) Contributory negligence. (B)  
13           895.045 (B) COMPARATIVE NEGLIGENCE. Contributory negligence does not bar  
14 recovery in an action by any person or the person's legal representative to recover  
damages for negligence resulting in death or in injury to the person or property, if

④ Sec. #. RP; 895.045(1)(title)

1 that negligence was not greater than the combined negligence of all of the person  
2 persons against whom recovery is sought, but any damages allowed shall be  
3 diminished in <sup>↓</sup>the proportion to the amount of negligence attributed to the person  
4 recovering. The negligence of the plaintiff shall be measured separately against the  
5 negligence of each person found to be causally negligent. The liability of each person  
6 found to be causally negligent whose percentage of causal negligence is less than 51%  
7 is limited to the percentage of the total causal negligence attributed to that person.  
8 A person found to be causally negligent whose percentage of causal negligence is 51%  
9 or more Any person found to be causally negligent whose percentage of causal  
10 negligence is equal to or greater than the negligence of the person recovering shall  
11 be jointly and severally liable for the damages allowed.

History: 1971 c. 47; 1993 a. 486; 1995 a. 17; 2005 a. 155.

12 **SECTION 3.** 895.045 (2) of the statutes is repealed.

13 **SECTION 9309. Initial applicability; Circuit courts** ②

14 (1) CONTRIBUTORY NEGLIGENCE. The treatment of sections 805.14 (4) and  
15 895.045 (1) and (2) of the statutes first applies to actions commenced on the effective  
16 date of this subsection.

17 (END)



State of Wisconsin  
2009 - 2010 LEGISLATURE

LRB-1919/P1

RPN:cjs:rs

DOA:.....Gauger - Contributory negligence

**FOR 2009-11 BUDGET -- NOT READY FOR INTRODUCTION**

1 **AN ACT ...; relating to:** the budget.

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*Analysis by the Legislative Reference Bureau*

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11          **SECTION 3.** 895.045 (1) of the statutes is renumbered 895.045 and amended to  
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13          **895.045 Contributory negligence.** Contributory negligence does not bar  
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7 ~~found to be causally negligent whose percentage of causal negligence is less than 51%~~  
8 ~~is limited to the percentage of the total causal negligence attributed to that person.~~  
9 ~~A person found to be causally negligent whose percentage of causal negligence is 51%~~  
10 ~~or more~~ Any person found to be causally negligent whose percentage of causal  
11 negligence is equal to or greater than the negligence of the person recovering shall  
12 be jointly and severally liable for the damages allowed.

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16 895.045 (1) and (2) of the statutes first applies to actions commenced on the effective  
17 date of this subsection.

18 (END)